FILED
TONI HELLON
CLERK, SUPERIOR COURT
3/11/2015 4:14:10 PM

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. KENNETH LEE

CASE NO. CR20124652-002

DATE: March 11, 2015

STATE OF ARIZONA
Plaintiff,

vs.

ROBERT P. CORONADO (-002)
Defendant.

R U L I N G

IN CHAMBERS RULING RE: POST-CONVICTION RELIEF

I. Facts

Defendant Robert Coronado was charged with possession of a narcotic drug for sale, possession of marijuana, and possession of drug paraphernalia. He had two historical prior convictions and was on probation at the time of the offense. A plea offer was extended to Defendant while the case was in the Case Evaluation Unit ("CES plea"), for a class 2 felony with a sentencing range of 5 to 12.5 years. Defendant was advised of the details of the plea, which he was dissatisfied with, and, sometime between February 11, 2103 and February 25, 2013, (*see* Status Conference Minute Entry, Feb. 11, 2013; Status Conference Minute Entry, Feb. 25, 2023), he privately retained counsel Bobbi Berry with hopes that she could negotiate a more favorable plea offer. At a status conference on March 18, 2013, a pretrial conference was scheduled, the following exchange took place:

> Prosecutor: "The issue is it's in the case evaluation unit, and a plea will not be available at the pretrial conversation [sic], because at that point, it will be with a trial attorney. So if he changes his mind during the time, it's an issue."
> Berry: "Judge, what I'm willing to put on the record right now is that I've discussed that the plea is likely not to be available at the pretrial conference, but that's the probability, and he understands that. He's willing to take his chances."
>
> (Tr. Status Conf., Mar. 18, 2013, pg. 3, ln 18 – pg. 4, ln 2).

This plea was ultimately withdrawn by the State at the pretrial conference on April 16, 2013, and defense counsel refused to do a *Donald* record, stating she could not advise her client to take the plea while they were still missing important disclosure, including the lab reports and the chain of custody on the drugs. Defense counsel received the rest of this disclosure the day following the pre-trial conference.

Mariam K. Diggins
Law Clerk

In April and September 2013, defense counsel and the post-CES assigned prosecutor engaged in plea negotiations via email. In September, 2013, defense counsel attempted to get the same plea offer as the co-defendant. The prosecutor repeatedly explained that she had no reason to make a better plea offer than the first one offered, since at this point she had already started the work to prepare the case for trial and ordered lab tests done on the drugs. A second plea with a sentencing range of 9.25 to 18.5 years was offered. After a settlement conference held on October 7, 2013, the State offered the final plea agreement, to a class 2 felony with a sentencing range of 6.5 to 13 years. On October 29, 2013, Defendant pled to this final plea agreement, and on November 27, 2013, the Defendant was sentenced to 6.5 years. At both the change of plea and sentencing hearings, defense counsel made a record about her dissatisfaction with the history and plea negotiations of this case, including the issues with disclosure and, in her view, the unfair disparity of the co-defendants' pleas.

Defendant filed a timely Notice of Post-Conviction Relief. This Court has read Defendant's Petition, the State's Response, Defendant's Reply, all transcripts, and is familiar with the file.

II. Legal Analysis

In his Petition, Defendant contends that his counsel was ineffective by allowing his CES plea offer to lapse without attempting to negotiate a better plea or getting an extension of time to consider the first plea, and for not explaining to the Defendant the "County Attorney's policy of not giving a more favorable plea" after the CES plea. (Petition p. 8, Ln 4–9). Next, he argues he is not precluded from raising this claim under Ariz. R. Crim. P., Rule 32.2(a)(3) because his counsel did not give him the necessary information he would need to make a knowing and intelligent waiver of the CES plea.

An allegation of ineffective assistance of counsel is encompassed within Rule 32.1(a) as a claim that a defendant's conviction or sentence violates the Constitution of the United States or the State of Arizona. *State v. Herrera*, 183 Ariz. 642, 646, 905 P.2d 1377, 1381 (App.1995); *see also United States v. Pearce*, 992 F.2d 1021, 1023 (9th Cir.1993). In order for a petitioner to raise a colorable ineffective assistance of counsel claim, he must show that his counsel's performance fell below objectively reasonable standards and that the poor performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d 113, 114 (App.2004); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). If a petitioner fails to sufficiently establish either element, the reviewing court is not required to determine whether the other element has been established. *Jackson*, 209 Ariz. at ¶ 2, 97 P.3d at 114. A colorable claim of post-conviction relief is "one that, if the allegations are true, might have changed the outcome." *Id., quoting State v. Runningeagle*, 176

Mariam K. Diggins
Law Clerk

Ariz. 59, 63, 859 P.2d 169, 173 (1993). Whether a petitioner has presented a colorable claim for relief is a discretionary decision for the trial court. *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988).

A petitioner is not required to provide the court with detailed evidence in his petition; however, he must "provide specific factual allegations that, if true, would entitle him to relief." *State v. Donald*, 198 Ariz. 406, ¶ 17, 10 P.3d 1193, 1200 (2000). "[P]roof of ineffectiveness must be a demonstrable reality and not merely a matter of speculation." *State v. Schultz*, 140 Ariz. 222, 225, 681 P.2d 374, 377 (1984). Trial counsel is presumed to have acted properly unless a petitioner can show that counsel's decisions were not tactical, "but, rather, revealed ineptitude, inexperience or lack of preparation." *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984). Defense counsel need only be reasonably competent—perfection is not required. *State v. Ysea*, 191 Ariz. 372, ¶ 14, 956 P.2d 499, 503 (1998). A court must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. *Id.* at 690.

Criminal defendants do not have a constitutional right to a plea agreement and the power to offer a plea agreement rests solely with the prosecuting body. *State v. Donald*, 198 Ariz. at ¶ 14, 10 P.3d at 1200; *Jackson*, 209 Ariz. at ¶ 10, 97 P.3d at 117. However, once the State engages in the plea bargaining process, defendants have a Sixth Amendment right to be adequately informed of the consequences before deciding whether to accept or reject the offer. *Donald*, 198 Ariz. at ¶ 14, 10 P.3d at 1200. To establish deficient performance during plea negotiations, a petitioner must prove that the lawyer either (1) gave erroneous advice or (2) failed to give information necessary to allow the petitioner to make an informed decision whether to accept the plea. *Id.* at ¶ 15, 10 P.3d at 1200. "To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." *Missouri v. Frye*, 132 S. Ct. 1399, 1409 (2012). In addition, defendants must show that neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented. *Id.* at 1410.

First, the State argues that Defendant is precluded under *State v. Espinosa*, 200 Ariz. 503, 29 P.3d 278 (App. 2001), from raising this claim because he was aware that the plea would be withdrawn and did not object. Defendant counters that he is not precluded because he did not make a knowing, intelligent, and voluntary waiver of the plea agreement. *See Id.* at ¶ 7, 29 P.3d at 280. However, the only way to examine the circumstances surrounding Defendant's de-facto rejection of the plea (by not taking the plea prior to it lapsing) is to assess the Defendant's claim of ineffective assistance of counsel in regards to the plea on the merits. Therefore, Defendant's ineffective assistance of counsel claim is not precluded.

Mariam K. Diggins
Law Clerk

Currently, Arizona courts do not recognize that defense counsel can be found to be ineffective for failing to seek a plea offer. *See Jackson*, 209 Ariz. at ¶ 11, 97 P.3d at 117–18; *see also State v. Vallejo*, 215 Ariz. 193, ¶ 4, 158 P.3d 916, 917-18 (App. 2007). Defendant counters this with the contention, however, that in this case, Ms. Berry was hired for the sole and explicit purpose of negotiating a better plea for the Defendant. But while it is easy to assert that Ms. Berry was retained for one specific purpose (plea negotiations), the reality is that she was retained to represent Defendant in every capacity in his criminal case, including, had it come to it, trial. The fact that Defendant believed a privately-retained attorney might, for whatever reason, be in a better position to negotiate a more favorable plea offer is inconsequential, as Defendant was advised and aware that there was never any guarantee that Ms. Berry would succeed in obtaining a better plea offer than the CES plea. *See* State's Resp. Ex. A; *see also* Def.'s Aff. ¶ 3–5. In fact the State could have refused to even offer a plea once the CES plea was withdrawn. Regardless, the record in this case is clear: defense counsel did engage in plea negotiations with the State, requesting first a lower capped sentence and later arguing for the same plea as the co-defendant. Def.'s Ex. 4, 6. The first negotiations did take place before the Pre-trial Conference where the plea was withdrawn. *Id.* at Ex. 6. While the timing or the extent of the negotiations might not have met the Defendant's expectations when he hired Ms. Berry, this Court finds Ms. Berry's performance does not fall to the level of incompetence.

The purported policy of the Pima County Attorney's Office to not offer better pleas once the case has left CES and is assigned to a different prosecutor is of no consequence to this claim. Plea negotiations are highly individualized to the persons involved in those negotiations. What one prosecutor views as a fair plea offer, another might find unduly harsh or excessively lenient. There are a number of reasons why a change in prosecutor might result in a difference in plea negotiations. For instance, as a case progresses towards trial and more investigation is done, the State's case may get weaker – perhaps there are issues with witnesses, lab results, or chain of custody. When this happens, it is likely that the State will offer a more beneficial plea offer than was previously offered, regardless of any office policy to the contrary. *See Premo v. Moore*, 562 U.S. at 124–25. "Plea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks." *Id.* at 124. In hindsight, it is easy to criticize an attorney for her unsuccessful maneuvering, but there is a strong presumption that counsel's actions were tactical, and Defendant in this instance has not overcome that presumption. *See State v. Nash*, 143 Ariz. 392, 398, 694 P.2d 222, 228 (1985).

Mariam K. Diggins
Law Clerk

In regards to counsel's failure to get an extension of time to consider the plea, at the time Ms. Berry was retained, Defendant had already been made aware of the terms of the CES plea and had already decided to reject it in hopes of receiving a better plea offer. *See* State's Resp. Ex. A; *see also* Def.'s Aff. ¶ 2. There is no indication that an extension of time would have changed Defendant's mind. In addition, Defendant was aware of the plea from at least January 28, 2013 (*see* Case Management Conference Minute Entry, Jan. 28, 2013), and his affidavit reveals that he never intended to take the CES plea and hired Ms. Berry with the sole motivation of hopefully getting a better offer than the CES plea. Def.'s Aff. ¶ 2–5. This point also illustrates that Defendant has not proven prejudice. Defendant repeatedly expresses dissatisfaction with the original, CES plea and the desire for a better plea offer in his Affidavit. This leads this Court to believe that he never intended to enter into the CES plea, particularly since he hired Ms. Berry specifically because he was unhappy with the terms of the CES plea. That she was ultimately unsuccessful in obtaining a better offer does not change the fact that Defendant has demonstrated that he was always unwilling to accept the CES plea until he had to face the unfortunate reality that the State was unwilling to offer him anything better, at which point it was too late. Defendant took a risk, and in the end, that decision did not work out for him.

For the reasons discussed above, the Court finds that the Petitioner has failed to establish that he has a colorable claim of relief on the basis of ineffective assistance of counsel.

THEREFORE IT IS ORDERED denying Defendant the relief he requests, and **dismissing** this Petition for Post-Conviction Relief.

/s/
HON. KENNETH LEE
(ID: cf08dced-3145-4958-9898-8c82d91a0abb)

cc: Hon. Kenneth Lee
County Attorney – Faten Barakat-Nice, Esq.
Harley Kurlander, Esq.
Attorney General - Criminal - Tucson
Clerk of Court - Appeals Unit
Clerk of Court - Criminal Unit
Clerk of Court - Under Advisement Clerk

Mariam K. Diggins
Law Clerk